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No. 86-87

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In The
Supreme Court of the United States
October Term, 1986

UNITED STATES OF AMERICA,
Petitioner,

v.

ANTHONY SALERNO and VINCENT CAFARO,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

MOTION TO FILE BRIEF
AND
BRIEF AMICI CURIAE OF
AMERICANS FOR
EFFECTIVE LAW ENFORCEMENT, INC.,
JOINED BY
THE INTERNATIONAL ASSOCIATION OF
CHIEFS OF POLICE, INC.,
THE LEGAL FOUNDATION OF AMERICA,
THE NATIONAL DISTRICT ATTORNEYS
ASSOCIATION, INC., AND THE
NATIONAL SHERIFFS' ASSOCIATION,
IN SUPPORT OF THE PETITIONER.

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MOTION OF AMICI CURIAE TO FILE BRIEF

Come now Americans for Effective Law Enforcement, Inc., *et al.*, and move this Court for leave to file the attached brief as *amici curiae,* and declare as follows:

1. *Identity and Interest of Amici Curiae.* The *amici curiae* are described as follows:

Americans for Effective law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* seventy-seven times in the Supreme Court of the United States, and thirty-six times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The Legal Foundation of America (LFA), is a nonprofit corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. The Foundation's attorneys have previously appeared as *amicus curiae* in this Court to urge this view. All litigation undertaken by the Foundation is approved by its Board of Trustees, the majority of whom are attorneys. LFA does not accept private fees and is supported by grants from the public.

The National District Attorneys Association, Inc.

(NDAA), is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Fourteenth Amendment.

2. *Desirability of an Amici Curiae Brief.* *Amici* are professional associations representing the interests of law enforcement agencies at the national, state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility, *inter alia*, of enforcing state bail provisions and making bail recommendations to courts; and (2) prosecutors, county counsel and police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers, administrators and courts in connection with bail matters.

Because of the relationship with our members, and the composition of our membership and directors-including active law enforcement administrators and counsel-we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court. We respectfully ask this Court to consider this information in reaching its decision in this case.

3. *Reasons for Believing that Existing Briefs May Not Present All Issues.* AELE, IACP, LFA, NDAA, and NSA

are national associations, and their perspective is nationwide. This brief concentrates on policy issues, including the values served by bail provisions that take into consideration the safety of the community, and the need to give prosecutorial agencies and courts clear guidance with respect thereto. Although Petitioner is clearly represented by capable and diligent counsel, no single party can completely develop all relevant views of such issues as these.

4. *Avoidance of Duplication.* Counsel for *amici curiae* has reviewed the Petition for Certiorari and the brief of counsel for Petitioner in an effort to avoid unnecessary duplication. It is believed that this brief presents certain policy issues that are not otherwise raised.

5. *Consent of Parties or Requests Therefor.* Counsel has requested consent of the parties. The consents of Petitioner and Respondent Salerno have been received and filed with the clerk of this Court. This Motion is necessary because Respondent Cafaro has not as of the time of printing of the Brief granted consent to the *amici* in writing. Should it be received thereafter it will be filed with the clerk of this Court.

For these reasons, the *amici curiae* request that they be granted leave to file the attached *amici curiae* brief.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

The Interest of Amici Curiae is as stated in the above Motion to File Brief.

ARGUMENT

THE BAIL REFORM ACT OF 1984, 18 U.S.C. SECTION 3142(e), WHICH AUTHORIZES PRETRIAL DETENTION OF AN INDICTED DEFENDANT IF NO RELEASE CONDITION "WILL REASONABLY ASSURE * * * THE SAFETY OF ANY OTHER PERSON IN THE COMMUNITY" IS NOT UNCONSTITUTIONAL; AS A MATTER OF PUBLIC POLICY, THE PEOPLE MUST BE ABLE TO TAKE RESPONSIBLE AND CONSTITUTIONAL MEASURES TO SECURE THEIR SAFETY AND WELL-BEING IN BAIL MATTERS.

The court below, *U.S. v. Salerno,* 794 F.2d 64 (2nd Cir. 1985), ruled that the provision of the Bail Reform Act of 1984, 18 U.S.C. Section 3142(e), which permits pretrial detention on the ground that no combination of release conditions will reasonably assure the safety of the community or of any person, violates the Fifth Amendment Due Process Clause.

Amici curiae will not duplicate the case law analysis presented by the Petitioner United States of America in this case, although we agree with that analysis. Instead, we will concentrate upon issues of policy that concern our law enforcement constituency and the communities they represent. The traditional purpose of bail is to assure the trial court that the defendant will appear for trial. In 1984 Congress enacted the Bail Reform Act of 1984 which provides that bail may be denied in the federal system if (1) there is no reasonable assurance that the person will appear as required, or (2) release will endanger the safety of any other person or the community. The latter provision is in the nature of preventive detention.

Although this Court declined to consider the issue of preventive detention for adults in *Murphy v. Hunt,* 455 U.S. 478 (1982), a 6-3 majority of the Court in

Schall v. Martin, 467 U.S. 253, 104 S.Ct. 2403 (1984), had no difficulty resolving the issue for juveniles. In an opinion written by then Associate Justice Rehnquist, the Court held that New York's statute providing for the detention of an accused juvenile delinquent on the basis of a finding of a "serious risk" that he may, before his case is adjudicated, commit a criminal act does not violate the Due Process Clause of the Fourteenth Amendment. The Court found a legitimate state interest for such statutes, stating that, "the combined interest in protecting both the community and the juvenile himself from the consequences of future criminal conduct is sufficient to justify such detention." Thus, while the juvenile may have a substantial interest in his freedom, under appropriate circumstances a state's interest in promoting public safety is equally important. The statute was not used or intended as punishment; the detention was strictly limited in time, and conditions of confinement reflected proper regulatory purposes. The Court also found sufficient procedural protections in the statute to satisfy the Fourteenth Amendment: notice, a hearing, and a statement of facts and reasons were afforded a juvenile prior to any detention; additionally, a formal probable cause hearing was provided shortly thereafter. The Court noted that such statutes have gained universal acceptance among the states:

> The substantiality and legitimacy of the state interests underlying this statute are confirmed by the wide-spread use and judicial acceptance of preventive detention for juveniles. Every State, as well as the United States in the District of Columbia, permits preventive detention of juveniles accused of crime. A number of model juvenile justice acts also contain provisions permitting preventive detention. And the courts of eight States, including the New York Court of Appeals, have upheld their statutes with specific reference to protecting the juvenile and the community from harmful pretrial conduct, including pretrial crime.

104 S.Ct. at 2411-2412.

Amici submit that the preventive detention provisions of the 1984 Act represent Congress' considered response to the problem of balancing the right of individuals charged with crime to be free pending trial, and the community's interest in protecting itself from those defendants who would continue to prey upon innocent victims pending trial. The issues are the same whether the offender is a juvenile or an adult. Indeed, as noted by the Petitioner, the majority of federal courts that have considered the constitutional issues involved in such provisions have found that the Act does not violate due process. *See, e.g., United States v. Walker,* Nos. 86-5264 and 86-5272 (9th Cir. Nov. 5, 1986); *United States v. Rodriguez,* No. 86-5631 (11th Cir. Oct. 14, 1986); *United States v. Simpkins,* No. 86-3049 (D.C. Cir. Oct. 6, 1986); *United States v. Zannino,* 798 F.2d 544 (1st Cir. 1986); *United States v. Perry,* 788 F.2d 100 (3d Cir.), cert. denied, No. 86-5172 (Oct. 6, 1986); *United States v. Portes,* 786 F.2d 758, 767 (7th Cir. 1985); *United States v. Accetturo,* 623 F. Supp. 746 (D.N.J. 1985), aff'd, 783 F.2d 382 (3d Cir. 1986); *United States v. Freitas,* 602 F. Supp. 1283 (N.D. Cal. 1985); *United States v. Acevedo-Ramos,* 600 F. Supp. 501 (D.P.R. 1984), aff'd, 755 F.2d 203 (1st Cir. 1985); *United States v. Hazzard,* 598 F. Supp. 1442, 1450-1452 (N.D. Ill. 1984). In addition, several states have amended their constitutions or have passed statutes to permit pretrial detention based on a finding of danger to the community. See Ariz. Const. art. I, §22(3); Ariz. Rev. Stat. Ann., §13-1961B (1985 Supp.); Cal. Const. art. I, §12(b); Colo. Const. art. II, §19(b); Fla. Const. art. I, §14; Fla. Stat. Ann., §907.041(4); Code Va., §19.2-120(2) (1983); most recently (November 4, 1986), the electorate of Illinois, by a 77 per cent margin, approved a state constitutional amendment:

> . . .to empower judges to deny bail to persons charged with felonies which carry mandatory

> prison sentences upon conviction if the proof is evident or the presumption great that the person charged committed the crime and if the court, after a hearing, finds that the defendant poses a threat to the safety of any person.

Chicago Tribune, November 6, 1986, Section 1, p. 5.

Amici submit that bail has never been perceived as an absolute right in our American system of justice and should not be perceived as a single function mechanism in this framework. Respondents may view the primary function of bail as a method of assuring that a defendant will appear at his trial. There is a significant danger, however, in accepting this as the *sole* purpose and function of bail. Pretrial release, by its very nature and practical application, can and must also be a method of protecting the law-abiding members of our communities.

On February 8, 1981, in his Annual Report on the Judiciary to the American Bar Association, then Chief Justice Burger of this Court directly addressed this point, when he stated:

> I am not advocating a new idea but merely restating an old one that we have ignored. At this point judicial discretion and judicial restraint require me to stop and simply to repeat that governments were instituted and exist chiefly to protect people. If governments fail in this basic duty they are not excused or redeemed by showing that they have established the most perfect systems to protect the claims of defendants in criminal cases. *A government that fails to protect both the rights of accused persons and also all other people has failed in its mission.* (Emphasis added).

67 A.B.A.J. 292 (1981).

Without minimizing the need to secure a defendant's presence at trial, *amici* urge that sole reliance on this function as the basis for bail would foster a situation where the defendant who aggravates his initial charge by merely forgetting or misconstruing his court date would be incar-

cerated pending trial, while a defendant who repeatedly aggravates his initial charge by going on a crime spree, yet continues to faithfully appear before the court, would be free to continue his illegal activities, at least until the time of a conviction. We submit that our jails are not more suitably used for protecting us from the confused or absent minded defendant who fails to appear, rather than those who pose a significant and on-going threat to the safety and security of our citizens through their continuing criminal conduct.

An additional consideration of the misconception that pretrial release is solely for the purpose of assuring the defendant's appearance at trial is the effect that such a view has on deterrence of crime. When a dangerous defendant is released on bail, he is not only placed in a position enabling him to commit further crimes, but he is in a position to do so without any significant threat of further sanctions. Chief Justice Burger took a practical view of this when he stated:

> It is clear that there is a startling amount of crime committed by persons on release awaiting trial, on parole, and on probation release. It is not uncommon for an accused finally to be brought to trial with two, three, or more charges pending. Overburdened prosecutors and courts tend to drop other pending charges when one conviction is obtained. Should we be surprised if the word gets around in the "criminal community" that you can commit two or three crimes for the price of only one and that there is not much risk in committing crimes while awaiting trial? (footnote omitted).

67 A.B.A.J. 292 (1981).

Our system of criminal justice is founded in large part on the concept of deterrence. Considerations which subvert that concept greatly undermine any potential for effective law enforcement. Bail provisions which do not consider the government's responsibility of protecting its citizens readily fall into this category. Yet until recently the bail

provisions of the various states and the federal government have been almost exclusively of the assurance type, rather than deterrence type.

We applaud the role of the Bail Reform Act of 1984 in reversing this emphasis - or at least restoring a proper balance that takes into consideration the concerns of the law-abiding – and in encouraging the states to adopt more balanced bail provisions. Our constituencies are of the firm belief that preventive detention has effectively *reduced crime in our communities.*

Even when assurance-type bail provisions were the nearly-exclusive model for bail statutes, it was acknowledged that common practice allowed the setting of high bail for defendants who were believed to be of significant danger to the community, regardless of the likelihood of the defendant's appearing at trial. See U.S. Dept. of Justice, *Proceedings and Interim Report of the National Conference on Bail and Criminal Justice,* (1965); *Footnote to Furman: Failing Justification for the Capital Case Exception to the Right to Bail After Abolition of the Death Penalty,* 10 San Diego L. Rev. 349 (1973); and *Forcible Rape and the Right to Bail,* 17 San Diego L. Rev. 1061, 1068 n. 37 (1980).

The American Bar Association several years ago aptly identified the conflict inherent in a legal framework that formally provides only the assurance-type of bail provisions, but which, by necessity, practices deterrence as well. The commentary to the ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Pretrial Release (1968) stated:

> It is no secret that many judges when faced with a defendant whom they fear will commit "additional crimes" if released, feel compelled to set bail beyond his reach. In effect, bail is used to deny rather than to facilitate pretrial release . . . So-called preventive detention should be dealt with openly and on its own merits, not masked behind

manipulation of bail amounts.

It therefore is imperative to acknowledge that pretrial release does have *two functions*, and that neither is to be subservient to the other. A government's responsibility must be extended to that of protecting its citizens and this must be balanced with the assurance of appearance at trial.

Additionally, *amici* note that the Attorney General's Task Force on Violent Crime-Final Report made a similar recommendation when it stated in 1981, "The Attorney General should support or propose legislation to amend the Bail Reform Act that would accomplish the following: (a) Permit Courts to deny bail to persons who are found by clear and convincing evidence to present a danger to particular persons or the community." 29 CrL 3133 (1981). Indeed, that is exactly what the Bail Reform Act of 1984 and similar provisions of the various states have done.

Amici submit, that in the final analysis the decision that a government makes concerning bail availability is a legislative/political statement of how best it can protect itself and its people from the predilections of dangerous and recidivist offenders. Other countries have had no difficulty in recognizing this essential nature of the bail question and have acted accordingly. For example, the English bail provisions contain these exceptions, *inter alia*, to the availability of bail in that country:

Exceptions to right to bail

2. The defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would -

(a) fail to surrender to custody, or

(b) *commit an offence while on bail*, or

(c) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person.

Bail Act of 1976, the Public General Acts and General Synod Measures, p. 1299 (London, H.M.S.O. 1976) (Emphasis added).

Other civilized countries similarly recognize the right of Society to protect itself through various forms of preventive detention. In Canada, "just cause" may be the basis for denial of bail, The Canadian Constitution of 1981, Part 1, Schedule B, Mobility Rights, subd. 11(e)("not to be denied reasonable bail without just cause"); in Japan, the practice is to detain offenders for reasons not related to guaranteeing their appearance in court in approximately 90 per cent of criminal cases, Terrill, World Criminal Justice Systems: A Survey, 276 (1984); in France, an offender who has previously been convicted of a felony or sentenced to jail for more than three months, may be denied bail as "an exceptional measure," Terrill, p. 146; in Sweden, there simply is no constitutional right to be released on bail, although the Swedish Code of Judicial Procedure allows the courts, *the prosecutor, or police* to substitute travel restrictions for detention while awaiting trial; violation of travel restrictions can lead to arrest and detention, Terrill, p. 207.

These sample provisions, all of which are based on the principle of preventive detention, are illustrative of a free Society's inherent legislative/political right to protect itself. The Bail Reform Act of 1984 provides a reasonable balance to individual rights and the interests of Society. The Act provides an overlay of procedural protections well-suited to avoid arbitrary use of preventive detention or abuse of judicial discretion. *Amici* respectfully request, on behalf of our law enforcement constituency, that these reasonable provisions be upheld so that the statutory and state constitutional amendment process that has begun in our country can continue. **In our considered view, no single measure in criminal justice today holds greater promise for cutting the rates of crime in America than pre-trial preventive detention of dangerous offenders and recidivists.**

CONCLUSION

Amici respectfully request this Court to (1) reverse the decision of the court below on the basis of law and sound judicial policy, and (2) declare that bail provisions that take into consideration the safety and well-being of the community are constitutional and comport with sound public policy.

Respectfully submitted,

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